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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY

ROBERT S. CATZ
Cleveland Marshall
College of Law
Cleveland, Ohio

OSCAR B. GOODMAN
Goodman, Terry,
Stein and Quintana
Las Vegas, Nevada

TERENCE J. ANDERSON
Counsel of record

c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for
The Honorable Harry Eugene Claiborne,
Petitioner

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PETITIONER'S REPLY

The government's brief in opposition is based upon a mischaracterization of the questions presented and an unfair statement of the case. This reply is submitted to assure that the Court is not mislead about the nature or content of the record below.

1. The government's conclusion that there has been no "change in circumstance" since petitioner first presented his claim that the Constitution defines a mandatory sequence of remedies (Br. Op. 6-7) is false.

Petitioner has been convicted, and a sentence has been imposed that would functionally remove him from his district and his office for the period of his incarceration without his having been impeached or removed by the processes the Constitution specifies as exclusive. Cf. United States v. Hastings, 681 F.2d 706, 712 n.19 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983). The conviction and sentence are the changes in circumstance that make review appropriate now. What all have conceded is a substantial constitutional question is now clearly and unavoidably presented in this case. The Court should grant review to resolve that question here.

2. The Honorable Stephen Reinhardt, Circuit Judge, United States Court of Appeals for the Ninth Circuit, has described the specific allegations that Judge Claiborne made to demonstrate that the executive's decision to investigate and prosecute him were motivated in fact by an intent to retaliate

against him for his judicial decisions and to drive him from the bench. United States v. Claiborne, 781 F.2d 1327, S.A. 1-15 (dissenting from denial of rehearing en banc).[1] The government characterizes these as "bare allegations" that do not satisfy the standards of pleading appropriate to a case such as this. Br. Op. 7-8. Either the government or Judge Reinhardt is being less than candid concerning the content of the record below.

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1. The petition was filed on January 15, 1986. On January 30, 1986, Circuit Judge Reinhardt filed an additional opinion dissenting from the denial of rehearing en banc. On February 10, 1986, Circuit Judge Pregerson filed a brief opinion stating that he also dissented from the denial of rehearing en banc. Petitioner subsequently filed a Supplemental Appendix setting out Judge Reinhardt's (S.A. 1-33) and Judge Pregerson's (S.A. 34) opinions.

Petitioner is satisfied to rely upon Judge Reinhardt's description.[2]

Judge Reinhardt's opinion also makes clear the need for this Court to exercise its supervisory jurisdiction in this case to determine whether the special and irregular procedures employed in the courts below were consistent with the right to a fair and impartial trial and review that are afforded citizens other than United States judges. S.A. 15-33. The government ignores the particular irregularities that occurred in this case and the special procedures that have been employed in all prosecutions directed at

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2. The government also seeks to avoid the second question by ignoring the need for institutional protection for judges. Instead, it suggests the "omnipresence of the news media" provides protection enough. Br. Op. at 9. Were that true in fact, there would have been no prosecution here. Moreover, the government fails to acknowledge that the framers sought to provide institutional protections for judges and the federal courts that would not leave their independence dependent upon the professional responsibility of executive office holders. Cf. id.

federal judges. Br. Op. at 11 n.7. In lieu of response, it mischaracterizes petitioner's claim as a demand for "special rights and privileges." Id.

Petitioner submits that this Court should grant review to determine the procedures by which cases involving federal judges are to be managed to assure that federal judges receive the same protections afforded other citizens if they are to be prosecuted while they remain in office. As did Judge Reinhardt, petitioner submits that review by this Court is the only step that can now afford "Judge Claiborne consideration of his case by a tribunal that had all the appearances of fairness." (S.A. 29). See also Riley, Did Burger violate in Claiborne Case, Nat'l. L.J., Feb. 17, 1986, at 3 (article reporting procedures employed in designating special panel); Change the System, id., at 12 (editorial urging adoption of

random selection procedure for special panels).

3. The government mischaracterizes the nature of the Brady issue and unfairly states the facts upon which it is presented. Br. Op. at 11-13, 3-6. In United States v. Bagley, 105 S.Ct. 3375 (1985), the Court prescribed a standard of review that the lower courts were to apply to determine where the prejudicial effect of improperly withheld exculpatory material required reversal. The government argues that the application of that standard involves a "factbound determination [that] does not warrant further review." The government's conclusory assertion ignores the conclusion articulated by Circuit Judge Ferguson and adopted by Circuit Judges Reinhardt and Pregerson below. United States v. Claiborne, A. 127-35 (Ferguson, C.J., dissenting from denial of rehearing en banc); id. at S.A. 1-33, 19 n.3 (Reinhardt, C.J., dissenting from denial of rehearing en banc);

id. S.A. 34 (Pregerson, C.J., dissenting from denial of rehearing en banc).

The government also unfairly states the evidence against Judge Claiborne in a manner calculated to suggest tacitly that disclosure of the interview reports withheld by the trial court should not undermine confidence in the jury's verdict. Br. Op. at 3-6.[3] The government acknowledges that Judge Claiborne initially advised his accountant that his income for 1979 from his practice was over $46,000 and that he paid his estimated tax liability on that basis. Br. Op. at 4. The government concedes that the figure set forth

3. The two grand juries whose deliberations were not infected by Conforte's testimony did not indict Judge Claiborne on the unrelated tax-evation counts. Only the grand jury that did receive the purchased testimony returned an indictment. The government's evidence on the unrelated tax counts was such that the first jury to hear it could not reach a verdict. The very length of the discussion by the special panel below makes clear that the questions raised by Judge Claiborne with respect to the sufficiency of the evidence were substantial A.1, 40-54. Petitioner has not presented those questions here.

in Judge Claiborne's letter to Wright dated April 11, 1980, was the correct figure. Id. at 5 n.2. The government does not disclose that Wright's "secretary" who could not recall receiving that letter was also Wright's wife and the person in his office who had kept Judge Claiborne's books. And the government does not acknowledge that Wright's testimony concerning the later notes (GX.31) in which the $22,322.97 figure appeared was conflicting.

As the government points out, Wright claimed at one point that he received the $22,322.97 figure from Judge Claiborne. Br. Op. at 5. The government does not point out, however, that Wright also testified that it was Wright who had given this figure to Judge Claiborne (Tr. 1201-02) and that Wright, when confronted with the conflict, disclaimed any present recollection (Tr. 1202-03). The government also fails to point out that Wright's latter version that was consistent

with Judge Claiborne's testimony. Judge Claiborne testified that the handwritten notes (GX.31) were made while he had no records before him during a telephone call in which Wright supplied all the figures (Tr. 873-77).

It is clear that Judge Claiborne's credibility was central to the jury's verdict--both tax counts required the government to prove his state of mind and intent at the times he signed each of the returns.[4] Central to that determination was the jury's determination whether Judge Claiborne and his

4. The special panel acknowledged that the jury's determination of Judge Claiborne's credibility was central on both counts. A. 44-54. The question on the 1979 return was whether Judge Claiborne had disclosed all the income from his former practice to his then accountant, Jay Wright. The question on the 1980 return was whether a former trial lawyer and present federal judge who had consistently relied upon those who held themselves out as experts to keep his books and prepare his tax returns relied in good faith on his then accountant's determination that the residual proceeds received from his practice two years after he assumed the bench should be characterized as capital gains from the disposition of his practice rather than ordinary income.

secretary were being truthful when they testified that the April 11th letter had been written and delivered to Wright's secretary, Mrs. Wright. Wright's assertion that he had never lost or misplaced any of Judge Claiborne's records and that they did not have the letter directly conflicted with and undermined the Judge's testimony and his credibility.

The trial court failed to examine or disclose the FBI reports showing that Wright had told the FBI that he and his wife had "misplaced or inadvertently destroyed records" and had thrown away some of Judge Claiborne's records when Wright had moved in 1981. The prejudicial effect of those failures must be judged in the context of all the evidence that was before the jury, not just the evidence that the government would emphasize to avoid review here.

4. Two developments have occurred since the petition was filed that bear upon the

need for review here. First, the additional dissents filed by Circuit Judges Reinhardt (S.A. 1-33) and Pregerson (S.A. 34) emphasize the concerns raised in the petition and have generated concerns in the press. See, e.g., Riley, Did Burger violate law in Claiborne Case, supra, Change the System, supra. This Court should address those concerns.

Second, two additional petitions have been filed that ask this Court to give content to the constitutional protections necessary to maintain the independence of the courts and preserve the necessary separation of powers. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, Hastings v. Judicial Conference of the United States, No. 85-1301 (filed January 30, 1986), and Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Hastings v. Godbold, No. 85-1609 (filed March 28, 1986). All three petitions are related in

that each asks the Court to determine the content of the constitutional scheme adopted to establish and maintain the courts as a separate and independent branch of government. Petitioner submits that the Court should consider the need to resolve the first two questions presented here as part of the broader context posed by the questions presented by all three petitions.

Accordingly, petitioner submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

Robert S. Catz
Cleveland Ohio

Oscar B. Goodman
Las Vegas, Nevada

Terence J. Anderson
Counsel of Record
c/o University of Miami
School of Law
Coral Gables, Florida
33124-8087
(305) 284-2971

attorneys for petitioner